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 MORIS FLORES

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
 Plaintiff,

vs.

MORIS FLORES,
 Defendant.

No. CR 08 0730 WHA

**DEFENDANT'S MEMORANDUM
 RE SENTENCING AND MOTION
 FOR DOWNWARD DEPARTURE**

Date: November 30, 2011
 Time: 8:00 a.m.
 Court: Hon. William Alsup

Defendant MORIS FLORES submits the following memorandum concerning his sentencing in this matter. In sum, Mr. Flores submits that a sentence of 35 years imprisonment is sufficient to satisfy the requirements of the controlling statute, 18 U.S.C. section 3553.

I. THE COUNTS OF CONVICTION

Defendant Flores was charged with three conspiracies and one substantive offense in the Third Superseding Indictment, and was convicted of each charge. The counts of conviction are: COUNT ONE – Conspiracy to Commit Racketeering - 18 U.S.C. Section 1962(d).; COUNT TWO - Conspiracy to Commit Murder in Aid of Racketeering - 18 U.S.C. Section 1959(a)(5); COUNT THREE - Conspiracy to Commit Assault With a Dangerous Weapon in Aid of Racketeering - 18 U.S.C. Section 1959(a)(6); and COUNT FOUR – Use/Possession of a Firearm in Furtherance of a Crime of Violence - 18 U.S.C. Section 924(c)(1)(A) and 2.

1 Though the Indictment also charged numerous substantive counts wherein co-defendants were
 2 charged with committing murders and assaults and other crimes in the course of the racketeering
 3 conspiracies, Mr. Flores is not charged in any of the substantive crimes of violence. See Third
 4 Superseding Indictment. The Indictment similarly does not charge Mr. Flores with having committed
 5 any specific predicate racketeering act.

6 II. THE APPLICABLE GUIDELINES.

7 A. The Count One Racketeering Conspiracy.

8 Over Mr. Flores' repeated objections, the Court held that the government need not submit to the
 9 jury the question of which predicate racketeering acts were the target offenses of the conspiracy. As a
 10 result, there is now no jury verdict as to whether Mr. Flores was liable, as predicate acts, for the five
 11 murders set out in the Presentence Report. See PSR at ¶¶ 76-111.

12 Initially, the PSR counts each of five separate homicides as if each was a first degree murder
 13 committed by Mr. Flores and thereby arrives at a base offense level of 43 and an adjusted offense level
 14 of 47. See PSR at ¶ 76-111. The PSR then groups each murder as a separate offense, which results in
 15 the application of five additional offense levels. See PSR at ¶ 111. Mr. Flores asserts these homicides
 16 should not be grouped as five separate offenses.

17 The application notes to Guidelines section 2E1.1 state, "[w]here there is more than one
 18 underlying offense, treat each underlying offense as if contained in a separate count of conviction for
 19 the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater
 20 offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever
 21 subsection results in the greater offense level." See U.S.S.G. § 2E1.1(2), Application n.1. Similarly,
 22 Guidelines section 1B1.2 provides, "[a] conviction on a count charging a conspiracy to commit more
 23 than one offense shall be treated as if the defendant had been convicted on a separate count of
 24 conspiracy for each offense that the defendant conspired to commit." See U.S.S.G. § 1B1.2(d). The
 25 application notes to that Guideline also state,

26 [p]articular care must be taken in applying subsection (d) because there are cases in
 27 which the verdict or plea does not establish which offense(s) was the object of the
 28 conspiracy. In such cases, subsection (d) should only be applied with respect to an
 object offense alleged in the conspiracy count if the court, were it sitting as a trier of
 fact, would convict the defendant of conspiring to commit that object offense.

1 U.S.S.G. § 1B1.2(d), Application n.1.

2 As the Eleventh Circuit has noted, “[i]t will not always be clear what the underlying
3 racketeering activity is under *U.S.S.G. § 2E1.1(a)* for the purpose of calculating the defendant's offense
4 level, because the jury’s verdict or the guilty plea may not specify which of the offenses listed in the
5 indictment was the object of the conspiracy. In these circumstances *section 1B1.2(d)* instructs courts
6 how to select the appropriate offense level.” *United States v. Farese*, 248 F.3d 1056, 1060 (11th Cir.
7 2001). The *Farese* court went on to hold,

8 [w]e have interpreted the words ‘were it sitting as a trier of fact’ in [Guidelines section
9 1B1.2] commentary to mean that the district court must find beyond a reasonable doubt
10 that the defendant conspired to commit a particular object offense before the court can
sentence the defendant on the basis of that offense. *See Ross*, 131 F.3d at 990 (citing
United States v. McKinley, 995 F.2d 1020, 1026 (11th Cir. 1993)).

11 *Farese*, 248 F.3d at 1060-61; see also *United States v. Tocco*, 306 F.3d 279, 287 (6th Cir. 2002)(“We
12 recognize that because the jury verdict for the Count 1 RICO conspiracy was general, we do not know
13 whether the jury found Tocco guilty of the conspiracy in regard to the Versaci Gambling Operation.”);
14 *United States v. Corrado*, 227 F.3d 528, 541 (6th Cir. 2000)(“The jury’s general verdict of guilty as to
15 the RICO conspiracy count did not indicate whether the jury found that the defendants had actually
16 conspired to murder Bowman.”); *United States v. DiGiorgio*, 193 F.3d 1175, 1177-78 (11th Cir.
17 1999)(because the jury returned a general verdict finding the defendants guilty of RICO conspiracy that
18 was ambiguous as to which acts supported the conspiracy conviction, the court properly based the
19 defendants’ offense level upon predicate acts that the court found the defendants had committed
20 beyond a reasonable doubt.).

21 In *United States v. Nguyen*, 255 F.3d 1335 (11th Cir. 2001), the sentencing court faced a similar
22 predicament. In *Nguyen*, the jury was not required to find which predicate acts each defendant had
23 agreed to commit or which acts each defendant knew and intended would be committed as part of the
24 pattern of racketeering activity. It was unclear which predicate acts supported the guilty verdicts on the
25 RICO conspiracy counts. *Id.* at 1341-42. The Court of Appeals held the sentencing court was
26 “therefore required to determine the predicate acts underlying each defendant’s conspiracy conviction
27 using the reasonable doubt standard.” *Id.* at 1342. The court went on to note,

28 [t]he offense levels of two defendants, Hoa Le and Pham, were based on findings by the
court using the preponderance standard. Moreover, the court’s application of the

grouping rules to predicate acts it found using the preponderance standard led to Doan's offense level being increased by two levels, changing his guideline range from 188 to 235 months to 262 to 327 months imprisonment. For this reason, the sentences of defendants Hoa Le, Pham and Doan must be vacated.

Id. (footnotes omitted).

Mr. Flores acknowledges that there is a circuit split on the issue of whether the Court must apply a beyond a reasonable doubt or preponderance standard. See, e.g., *United States v. Massino*, 546 F.3d 123, 135-36 (requiring a preponderance standard and collecting cases to that effect).

Because there is not sufficient evidence to find Mr. Flores either participated in or conspired to commit any of the five murders upon which the PSR relies, the additional five offense levels for grouping of the supposed separate underlying offenses should not apply.

B. Mr. Flores' Role in the Offense.

Mr. Flores submits that the recommended adjustment is not proper, and that the allegations in the Presentence Report regarding his role in the offense are not supported by evidence. See, e.g. *United States v. Patterson*, 962 F.2d 858 (5th Cir. 1992)(upward adjustment for role in the offense must be supported by reliable evidence, and cannot be based on speculation or unsworn hearsay statements contained in the Presentence report). The informants' conclusory allegations regarding Mr. Flores' supposed role as the "leader" in 2008 are not sufficient to establish his leadership role. See *United States v. Graham*, 162 F.3d 1180 (D.C. Cir. 1998)(upward departure for "leader" role not warranted where informant testified in conclusory manner that defendant was a "lieutenant" in cocaine distribution organization).

There is simply no evidence before the Court that the other defendants were under the control of Mr. Flores, and absent such control the adjustment is not warranted. See *United States v. Bapack*, 129 F.3d 1320 (D.C. Cir. 1997)(control over criminal scheme does not warrant aggravating role adjustment unless defendant actually controlled other participants); *United States v. Ramos-Oseguera*, 120 F.3d 1028 (9th Cir. 1997)(though defendant may occupy important role in criminal organization, upward adjustment not warranted unless it is shown that defendant exercised control over other participants).

The government's evidence of Mr. Flores' alleged leadership role in the gang comes solely from the informants/cooperators and opinion testimony from SFPD Gang Task Force Officer Molina.

1 However, while Mr. Claros-Acosta recorded hundreds of phone calls and face-to-face meetings
2 between MS-13 members, they do not evidence Mr. Flores' leadership of the 20th St. Clique. There is
3 one recording in which Mr. Flores' role in MS-13 is discussed at length at a gang meeting on August
4 23, 2008, at the very time the government claims Mr. Flores had assumed the role of leader.¹ In that
5 meeting, as reflected on the bodywire recording, various MS-13 members, including the informant
6 Claros-Acosta and Mr. Flores, discuss various people potentially acting as the leader of the 20th St.
7 Clique.

8 During the meeting, un-charged co-conspirator Juan Carcamo clearly acts as the leader of the
9 group and gives a series of orders to various members, including Mr. Flores. At one point Carcamo
10 tells Flores that Flores needs to "collect rent" from "Nieros". Flores responds that he does not want to
11 "collect the rent" because he is afraid the "Nieros" will tell Gang Task Force Officer Molina and that
12 he will be arrested. Flores then says to Carcamo and Claros-Acosta that they are in touch with the
13 "big homeys down south" (MS-13 leaders in Los Angeles and Central America), and that he is just a
14 soldier. Carcamo then asks Flores if he wants to "run this thing," and Flores replies no.

15 Flores, Carcamo and Claros-Acosta then discuss leadership and who will have "the wheel" and
16 communicate with the "big homeys." Flores repeatedly states he does not want to be in charge, or to be
17 the one to communicate with the "big homeys," and that Carcamo or Rafael Montoya should take
18 leadership.

19 Carcamo then addresses the members and says that if they don't want to be part of El
20 Salvador's or Los Angeles's "program," he will call the "big homeys", and 20th St. MS will operate
21 separately. Mr. Flores then addresses the members and clearly states he is not willing to "take the
22 wheel," or "call the shots," or to communicate with the "big homeys." The informant, Claros-Acosta,
23 then starts explaining that the only problem is communication, that Montoya can handle that, and that
24 Flores should take "the wheel." However, Flores states he does not want "the wheel," he is only in
25 20th St. because of "Psycho" (Marvin Carcamo, Juan Carcamo's brother), that he can't "run this
26 thing," and that he needs to work to support his family. Claros-Acosta then says, "so what's the deal
27

28 ¹ This recording is labeled Bates number DH201. The government proffered this recording at trial, but the Court excluded it due to Claros-Acosta being unavailable as a witness. See RT 10554-56.

1 because you guys haven't made a decision here?" Carcamo then says Flores should be the leader, and
 2 Flores repeatedly says no. Claros-Acosta then states, "I think 'Slow' (Mr. Flores' nickname) can't give
 3 up bein' in charge like that, either, because Psycho left you, homey." Montoya then says Flores should
 4 be in charge and Claros-Acosta agrees.

5 This recording shows that as of August 23, 2008, about two months before the unsealing of the
 6 Indictment and the following arrests, Mr. Flores was not the leader of 20th St. "clique" of MS-13, and
 7 that Claros-Acosta (who was an informant, and a *de facto* leader) was trying to push Flores to take a
 8 leadership role. It is also important to note that this conversation occurred after the murders and
 9 assaults on the "Nieros" and "Nortenos" that the government claims Mr. Flores ordered or encouraged
 10 in his supposed role of leader. The last of the assaults supposedly attributable to Mr. Flores' leadership
 11 was the killing of Ivan Miranda on July 31, 2008. Thus, while the government and Probation claim
 12 Flores was a leader of MS-13 and ordered numerous assaults and killings during the summer of 2008,
 13 Claros-Acosta was plainly attempting to convince Flores to be the leader in late August of 2008.
 14 Moreover, there is a great deal of evidence before the Court that Claros-Acosta represented to the 20th
 15 Street members that he was authorized by the "big homeys" to guide the 20th Street clique, and that
 16 following the arrests of Angel Guevara and Marvin Carcamo in December of 2007, they along with
 17 Claros-Acosta, Juan Carcamo, Tigre, Lobo, and Sleepy, all played roles in leading the 20th Street
 18 clique in 2008.

19 C. Objections to PSR Characterization of Mr. Flores' Role

20 The section of the report discussing "Role of Moris Flores" beginning at paragraph 59 indicates
 21 that Flores "pushed an agenda that involved a greater degree of violence and aggression", and that "one
 22 of Flores' objectives was retaliation against rival gang members" (paragraph 60), and that under
 23 "Flores' direction, murders committed by MS-13 in San Francisco began to accumulate".

24 In fact, there is no testimony from any witness that Mr. Flores ordered any of the homicides that
 25 were committed in 2007 or 2008. This seems, however, to be the implication of paragraph 60. This is
 26 confirmed by paragraph 65, where the report indicates that "Although Flores did not personally commit
 27 the murders, the death of each victim was an outcome of Flores' leadership and directive to seek
 28

1 suspected rivals in the community”. The report points to no testimony and specifies no factual basis in
2 making this assertion.

3 The leadership of the 20th Street Clique in 2008 was much more complex than the report seems
4 to indicate. Government cooperator Walter Palma testified that Cyco (Carcamo) and Peloncito
5 (Guevara) took over leadership in 2007, and that after they went to jail (in December of 2007) they
6 were “kind of running things from the jail” (Trial Tx 7394-7395). Palma and other cooperators
7 testified that Mr. Flores was a conduit between Cyco and Peloncito in jail, and the 20th Street members
8 who were on the street. Palma for example testified that Slow (Flores) was running things on the street
9 while Cyco and Peloncito were in jail (Trial Tx 7396, bottom). Palma also testified that the leadership
10 of Cyco and Peloncito was ongoing in the sense that they were the leaders in the MS Pod at the Dyer
11 Jail (after the arrests on this case, see Trial Tx 7494:20), and that Flores and Melvin Maldonado were
12 “messengers” at the jail - distributing information they were told to distribute (Trial Tx 7806:15-20).

13 Similarly, Government cooperator Abraham Martinez testified that Cyco and Peloncito were
14 “helping Slow run the neighborhood”, and that in March of 2008 (when Martinez was out of custody
15 and interacting with 20th Street members) Slow would send the “[youngsters] to the store and stuff”,
16 but he never ordered anyone to “go kill somebody” (Trial Tx 2307:1-15). Martinez further testified
17 that between March and July of 2008 he attended 5 or 6 20th Street meetings, only one of which was
18 run by Slow (the rest were run by Tigre - Ivan Cerna, see Trial Tx 2342:13-2343:4).

19 In fact the testimony indicates that there were a number of people who were in leadership roles
20 during 2008, rather than indicating that Mr. Flores was “the” leader who was pushing for an agenda of
21 increased violence, as the PSR seems to indicate. For example, Government cooperator Jose Espinal
22 testified that both Slow (Flores) and Sleepy were street leaders (Trial Tx 10820:5-15). Espinal also
23 testified that beginning in July 2008 20th Street member Sleepy was in charge (Trial Tx 10845:4-14).
24 This was during the time period when both the Estrada and Miranda homicides occurred. Espinal
25 reiterated later in his testimony that when he was told to go collect taxes in the Tenderloin by Roberto
26 Claros Acosta in 2008, it was Sleepy who was in charge (Trial Tx10876:10).

27 The government has taken the position that there was a transfer of leadership of the Clique from
28 Cyco and Peloncito to Mr. Flores in 2008. This position overly simplistic and is not borne out by the

1 evidence. The situation was much more complex, and there were several individuals who played some
 2 sort of street leadership roles during that year. They included Tigre, Lobo, Sleepy and Slow (Flores),
 3 as well as Cyco and Pelon, who continued to exercise leadership roles while incarcerated in the San
 4 Francisco County Jail (as is evidenced by various jail telephone calls and intercepted correspondence
 5 as well as witness testimony). It is not correct for the PSR to state or imply that any increase in
 6 violence by the 20th Street Clique in 2008 was under Mr. Flores' "direction".

7 The PSR fails to point to any evidence indicating Mr. Flores exercised control over the other
 8 defendants, and no such evidence was adduced at trial. The proposed four point adjustment for a
 9 leadership role is therefore not warranted.

10 II. MR. Flores' OFFENSE CONDUCT.

11 Mr. Flores agrees in part with the description of his offense conduct set out in paragraphs 42
 12 through 66 of the Presentence Report. However, as stated immediately above, Mr. Flores submits that
 13 the description in the PSR of Mr. Flores' alleged leadership role and his supposedly "ordering" or
 14 directing that certain murders be committed by other members of the conspiracy are not supported by
 15 the evidence and appear in the PSR as simple repetition, without independent analysis, of allegations
 16 the government made to U.S. Probation during "discussions with the U.S. Attorney's Office and the
 17 case agents" (PSR, ¶42) that defense counsel were not invited to attend.

18 Similarly, the Presentence Report inaccurately implies that it was "under the authority of
 19 Flores" that 20th Street members began to "tax" illegal document sellers who operated in the Mission
 20 District. See PSR at ¶ 62. In fact, the testimony of numerous witnesses at trial showed that this
 21 "taxing" activity began long before Mr. Flores assumed some sort of leadership role, including
 22 extensive testimony about the fact that Ivan Cerna had a longstanding "tax" agreement with leader of
 23 the document sellers (the "Miqueros"), Juan "Patas" Rodriguez.

24 Even the government admitted during its opening statement that the evidence "show[ed] that
 25 under [Mr. Carcamo's] leadership, the gang took an aggressive and violent direction." See RT 1279.
 26 Moreover, in its memorandum concerning Mr. Cerna's sentencing, the government informed the Court
 27 that it "agrees that the 20th Street clique *became more bloodthirsty beginning in 2004 and 2005*, when
 28 MS-13 gang members from Los Angeles and elsewhere settled into the Bay Area and sought to mold

1 the 20th Street clique in their own image.” Docket #3840 at p.3 (emphasis added). Jaime Martinez
2 testified that it was the other government informant, Mr. Claros-Acosta, who handed out new “rules”
3 concerning which members would be required to commit shootings. See RT at 5545, 6406.

4 Finally, the Presentence report argues that Flores “frequently” possessed firearms and
5 repeatedly had “constructive possession” of firearms, yet fails to point to or discuss a single occasion
6 when Flores actually or constructively possessed a gun.

7 A. The Ng/Joldic Homicide.

8 Mr. Flores admits that there is evidence before the Court from which the Court could conclude
9 that on the night his friend Triste was shot, Mr. Flores went to the Excelsior neighborhood in order to
10 retaliate against Norteno gang members. However, this same evidence shows that Mr. Flores was not
11 with Erick Lopez that night and did not personally participate in the shooting of Mr. Ng and Mr. Joldic.

12 The transcript of one of the recordings made by Roberto Claros-Acosta, which was admitted
13 into evidence at trial, reveals Mr. Flores talking with other members of 20th Street about Mr. Lopez
14 getting arrested with the gun that had been used in this shooting. This recording was made a few days
15 after the Ng/Joldic shooting, and on the recording Mr. Flores does not say anything about being present
16 himself at the scene of the shooting. In fact, right after Mr. Flores tells Claros-Acosta that Lopez got
17 arrested, Flores states, “*they’re* screwed now.” A few lines later, Mr. Flores says, “*they* hit them with
18 everything,” and “*they* killed them, *they* shot them man.”

19 Similarly, the extensive phone records that were admitted into evidence (see Exhibits 997 and
20 1024) show that Flores was at the Little Park (Mission Playground) when Triste was shot, that he
21 stayed around Little Park until after 11:00 p.m, and that he then went to San Francisco General
22 Hospital (where Triste was being treated). The records indicate that at 1:05 a.m., right between the
23 shots fired at Cypress St. and the shooting of Mr. Ng and Mr. Joldic, Lopez called Mr. Flores, but
24 Flores did not answer. Flores then immediately tried to call Lopez back, but Lopez did not answer.
25 When these calls were placed at 1:05 a.m., Flores’ cell phone used the tower near Little Park, but
26 Lopez’s phone used a cell tower on Palou Street in Hunters Point.

27 The Ng/Joldic shooting occurred at about 1:47 a.m. on March 29, while the shooting at Mission
28 and Cypress happened at about 11:45 p.m. on March 28. The records show that Mr. Flores’ cell phone

1 hit cell sites at 2601 Mission St. (at 22nd) and 375 Alabama (at 17th) until 11:40 p.m. See in Exhibits
2 997, 1024.

3 Beginning at 11:57:23, Mr. Flores' phone began hitting a cell tower located at 1431 San Bruno
4 Avenue, and continued hitting that tower until about 1:04:23 a.m. That cell tower is right across the
5 street from San Francisco General Hospital, where Triste was taken. Moreover, the cell tower data
6 matches the testimony of Abraham Martinez, who said he saw Mr. Flores at SF General when he also
7 went to go see Triste at the hospital.

8 At about 12:30 a.m., while Mr. Flores' phone is hitting off the tower near the hospital, Erick
9 Lopez's phone is used to place a call to Mr. Flores. Mr. Flores did not answer, and Mr. Lopez's phone
10 left an 18 second voicemail. Then, at 1:05 a.m., Mr. Flores twice tried to call Erick Lopez's phone.
11 Neither call connected, but Mr. Flores left a message on the second call. See Exhibits 996, 996, 1024.

12 Beginning at 1:21:14, Mr. Flores' phone began hitting cell towers 025 and 36. This continues
13 until 1:54:14. Cell tower 025 is at 4610 Mission St., between Persia and Brazil, about 8 blocks from
14 where Mr. Ng and Mr. Joldic were shot.

15 Mr. Flores' phone continued to hit cell towers 025 and 036 until 1:55:46, about ten minutes
16 after the first 911 call was made concerning the shooting of Mr. Ng and Mr. Joldic. In contrast, Mr.
17 Lopez's final call to hit tower 25 was at 1:48:22. His next cell call to hit a tower was at 2:09:33 and hit
18 tower 256 in Berkeley.

19 These records clearly show that Mr. Flores and Mr. Lopez were not together when Lopez shot
20 Mr. Ng and Mr. Joldic.

21 B. The Rodriguez Homicide.

22 There is no evidence whatsoever that Mr. Flores was present when Juan Rodriguez was allegedly
23 killed by Codefendant Cruz-Ramirez (see PSR at ¶ 62), or that Flores knew that Cruz-Ramirez
24 intended to commit the homicide before it happened. There is similarly no evidence that Mr. Flores
25 aided or abetted Cruz-Ramirez in the homicide. In fact, there is no evidence that Mr. Flores had any
26 contact with Cruz-Ramirez on the day of the killing. Furthermore, although the PSR asserts that Mr.
27 Cruz-Ramirez was the killer, he was acquitted of this murder by the jury.
28

1 C. The Estrada Homicide.

2 The evidence clearly established that Mr. Flores heard about the killing of Mr. Estrada.
 3 However, the evidence also showed Mr. Flores did not know about it ahead of time. According to the
 4 governments theory, Mr. Estrada was killed by codefendants Herrera and Cruz-Ramirez. See PSR at
 5 ¶ 63

6 Mr. Flores' work records, which were admitted at trial, show that Mr. Flores was at work at
 7 Restaurant Deport the entire day on July 11, 2011, when Estrada was killed. See Exhibit 2325. There
 8 is clear evidence that Mr. Herrera contacted Mr. Flores after the shooting. The government's expert,
 9 Mr. Dikovitsky testified that there were several phone calls and text messages between Mr. Herrera and
 10 Mr. Flores that day. See RT 12057, 12061. However, the first two contacts are calls to Mr. Flores'
 11 phone at 1:40 and 1:41 p.m, about an hour and a half after Mr. Estrada was killed. See *id.*; see also
 12 Exhibit 994. There is no evidence of any phone or text contacts that day between Mr. Flores, who was
 13 at work, and Mr. Herrera prior to the killing of Mr. Estrada.

14 D. The Miranda Homicide.

15 On the day of the Ivan Miranda homicide, the father of 20th Street member "Pistolita" was shot
 16 by government cooperator Walter Palma ("Capone") during a robbery.

17 Jose Espinal testified that as he left Little Park with Mr. Flores, Flores received a call from
 18 "Sleepy," who said that Pistolita's dad had been "hit." Mr. Flores then told Espinal it was "Chapos,"
 19 and because they couldn't "hit" 20th Street they were hitting their families. See RT 10580-10581.

20 According to Espinal, Flores then said they should do something. Espinal and Giovanni
 21 Hernandez looked for a knife in the car, but they did not find one. See RT 10583. Flores and
 22 Hernandez then asked Espinal to call "Duende" (Marlon Rivera) to tell him that they were picking him
 23 up. *Id.*

24 Alejandro Flores, Ivan Miranda's friend since they were little, testified that neither he nor Ivan
 25 were Norteno gang members. RT 3926-27. On the night Ivan Miranda was killed Alejandro was with
 26 his girlfriend Natalie Linares. RT 3935. Ivan came and met them on Lisbon St. RT 3942.

27 Shortly thereafter they were approached by Marlon Rivera (who Alejandro recognized) and four
 28 others (not including Mr. Flores). See RT 3942-3944. Alejandro testified he was "checked," and they

1 went through his pockets. RT 3945. The guys had knives, they took his MP3 player and his
 2 headphones. RT 3946. Ivan wouldn't give up his Ipod, and then he ran. He was pursued and stabbed
 3 to death. RT 946-47.

4 In sum, there is no evidence that Mr. Flores was involved in the robbery and killing of Ivan
 5 Miranda, and Mr. Flores was not identified by any of the witnesses as being one of the three men that
 6 approached Miranda and his friends and stabbed Miranda. Moreover, Miranda and his companions
 7 were not Nortenos, and did not appear to be rival gang members. Even assuming that the killing of Mr.
 8 Miranda was a spontaneous act done as revenge for Pistolita's father being shot, there is no evidence
 9 Mr. Flores was either involved or somehow directed that others commit the attack.

10 The evidence adduced at trial indicates that each of the five homicides charged in the
 11 indictment and described in the PSR were done in retaliation for violent attacks on 20th Street
 12 members. As such, it appears the retaliatory attacks involved little or no planning and instead were
 13 crimes of opportunity. The evidence also indicates Mr. Flores did not participate in any of the
 14 homicides, nor is there evidence showing Flores was a part of whatever minimal planning may have
 15 taken place before each attack.

16 III. THE APPLICABLE SENTENCING FACTORS.

17 Under *United States v. Booker*, the courts must treat the guidelines as just one of a number of
 18 sentencing factors set forth in the still valid portions of the Sentencing Act (18 U.S.C. § 3553), and all
 19 sentences will be reviewed for "reasonableness," rather than compliance with the Guidelines. See
 20 *Booker* at 803-04 ("Without the "mandatory" provision, the Act nonetheless requires judges to take
 21 account of the Guidelines together with other sentencing goals. See 18 U.S.C. A. § 3553 . . . Section
 22 3553 . . . sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate
 23 courts, as they have in the past, in determining whether a sentence is unreasonable.") Since *Booker*,
 24 these factors are all appropriate sentencing concerns, of which the guidelines sentencing range is only
 25 one part.

26 As the Supreme Court noted,

27 after giving both parties an opportunity to argue for whatever sentence they deem
 28 appropriate, the district judge should then consider all of the § 3553(a) factors to
 determine whether they support the sentence requested by a party. In so doing, he may

1 not presume that the Guidelines range is reasonable ... He must make an individualized
2 assessment based on the facts presented.

3 *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586, 596-97 (2007). The Court's decision in *Gall* also
4 rejects an "appellate rule that requires 'extraordinary' circumstances to justify a sentence outside of the
5 Guidelines range." *Id.*, 128 S.Ct. at 595.

6 On the same day it decided *Gall*, the Court held in *Kimbrough v. United States* that the
7 Guidelines are advisory only, and "it would not be an abuse of discretion for a district court to conclude
8 when sentencing a particular defendant that the crack/powder [cocaine] disparity yields a sentence
9 'greater than necessary' to achieve [18 U.S.C.] § 3553(a)'s purposes" *Kimbrough v. United States*,
10 552 U.S. 85, 128 S. Ct. 558, 575 (2007). *Kimbrough* suggests that if the Court determines there is a
11 similar, unintentional disparity among similarly situated defendants under the Guidelines, the Court
12 could determine that "a within-Guidelines sentence is 'greater than necessary' to serve the objectives of
13 sentencing." *Id.* However, the Guidelines range remains the "starting point" for the sentencing court's
14 assessment of the appropriate sentence. See, e.g., *United States v. Munoz-Camarena*, 631 F.3d 1028,
15 1030 (9th Cir. 2011).

16 Consistent with *Kimbrough*, the Court may sentence outside the guidelines and impose a
17 statutory sentence in accordance with the factors in 18 U.S.C. § 3553(a). In addition to the parsimony
18 provision, which requires that the sentence be "sufficient, but not greater than necessary, to comply
19 with the [statutory] purposes," 18 U.S.C. § 3553(a), another factor is "the need to avoid unwarranted
20 sentencing disparities among defendants with similar records who have been found guilty of similar
21 conduct...." 18 U.S.C. § 3553(a)(6). Accordingly, the Ninth Circuit has instructed that "[t]he
22 overarching statutory charge for a district court is to 'impose a sentence sufficient, but not greater than
23 necessary'" *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2007)(en banc). As a result, there is no
24 presumption of reasonableness when a court imposes a Guidelines range sentence. *Carty*, 520 F.3d at
25 991-992.

26 The Sentencing Act directs the courts to consider the need for the sentence imposed –

27 (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide
28 just punishment for the offense;

- 1 (B) to afford adequate deterrence to criminal conduct;
- 2 (C) to protect the public from further crimes of the defendant; and
- 3 (D) to provide the defendant with needed educational or vocational training, medical care,
- 4 or other correctional treatment in the most effective manner.

5 *See* 18 U.S.C. § 3553(a)(2). Section 3553(a) further directs sentencing courts to consider (1) the
 6 nature and circumstances of the offense and the history and characteristics of the defendant; (3) the
 7 kinds of sentences available; (4) the kinds of sentences and the sentencing range established for the
 8 offense under the Guidelines; (5) any pertinent policy statements issued by the Sentencing
 9 Commission; (6) the need to avoid unwanted sentencing disparities among defendants with similar
 10 records who have been found guilty of similar conduct; and (7) the need to provide restitution to any
 11 victims of the offense. Thus, the Guidelines range for the offense is but one of ten factors specified
 12 under The Sentencing Act.

13 IV. APPLICATION OF THE SECTION 3553(a) FACTORS TO MR. FLORES' CASE

14 WARRANTS A SENTENCE OF NO MORE THAN 35 YEARS IMPRISONMENT.

15 In accordance with *Booker*, *Gall*, *Kimbrough*, *Carty* and the directives of 18 U.S.C. § 3553(a),
 16 Mr. Flores submits the following concerning the Court's consideration of an appropriate disposition of
 17 his case.

18 A. The Nature and Circumstances of the Offense and the History and Characteristics of Mr.

19 Flores.

20 1. **The Nature and Circumstances of the Offense**

21 The offenses at issue in this case are undoubtedly among the most serious that can be charged
 22 in federal court. However, Mr. Flores was not one of the primary protagonists in any of the charged
 23 murders or assaults, nor did he ever arm himself for, or personally participate in any of the homicides.
 24 In addition, Mr. Flores is not asking for a minor sentence; whatever the Court might decide, Mr. Flores
 25 will serve several decades in prison.

26 Two important circumstances surrounding the commission of the instant offenses warrant a
 27 sentence of less than life imprisonment for Mr. Flores. First, as argued at length above, there is no
 28 evidence indicating Mr. Flores personally participated in the charged homicides, and the PSR does not

1 claim that he did. See PSR at ¶ 65. Next, for the entire time when Mr. Flores was a member of 20th
 2 Street, from the early 2000s when Flores was in his early teens (see PSR at ¶ 59) until his arrest in
 3 2008, Flores was mentored in the gang by older members who were both leaders of the gang and active
 4 government informants.

5 Jaime Martinez and Roberto Claros-Acosta were the two leaders of 20th Street in 2005 and
 6 2006, when Mr. Flores became an adult and joined the conspiracy. See, e.g., RT at 12820 (Martinez
 7 testifying that when he was arrested in the Fall of 2005 he was the leader of 20 Street). Martinez
 8 further testified that he attended the meeting at Sutro Park where he and Claros-Acosta informed those
 9 in attendance, including Mr. Flores, of the “new” way in which 20th Street would be run, and at which
 10 Ivan Cerna was removed from leadership of 20th Street. See RT at 12804, 5640; see also Exhibits
 11 1201B, 2410.² During the course of the meeting, Claros-Acosta informed Mr. Flores and the others
 12 that everyone must be “jumped in,” and that once you join the gang you are in it until death. See
 13 Exhibit 1201B, see also RT at 12836. Claros-Acosta wanted to fix what he advocated to be problems
 14 in the gang, such as a lack of knowledge of gang rules, and he dictated that there would be new rules
 15 that the members must follow. See RT at 12875. These new rules included putting in more “jale” for
 16 the gang. See RT at 2829, 3009. Around this time, Martinez was also telling people that Claros-
 17 Acosta was saying that 20th Street was being run wrong and criticizing Cerna’s leadership. RT at
 18 2761-2770; see also RT at 2480-2481. It is undeniable that at this time, when Claros-Acosta ordered
 19 people to be jumped in, ordered those present to follow the “new rules” he was handing down, and
 20 warned that failure would be punished by death (see RT 5858), Claros-Acosta was clearly a de facto
 21 leader of the group, and he was working for ICE.

22 Martinez likewise acted as the leader of 20th Street in 2006, after he began working for the
 23 government. According to testimony by his own nephew, Abraham Martinez, when Ivan Cerna
 24 stepped down as the leader of 20th Street, Mickey became the leader, a position he occupied until at
 25 least early 2007. See RT at 2277, 2280; see also RT at 2816-217, 2847, RT at 7335, 7395 (Palma re
 26 Martinez leadership). While he was acting as a leader of 20th Street, Martinez ordered members to

27
 28 ² The record is replete with recordings of such meetings at which Mr. Flores was present. See Exhibits 120F, 152T, and 164T, 1200T and 1201B are just a few examples.

1 “become more organized” and informed the members that they must follow the “L.A. Program.” See
 2 RT at 2836-2837. Martinez ordered members to commit a murder in order to become a “jumped in”
 3 member of the group. See RT at 7343. Abraham Martinez also testified that his uncle, while acting as
 4 a leader in 2006, told the members about the importance of following the new rules and doing “jale”
 5 for the gang. RT at 3011-3013. Walter Palma testified that in December of 2006, while Jaime
 6 Martinez was a leader of 20th Street as well as an informant, Martinez directed members to kill Manuel
 7 “Dreamer” Franco, a suspected informant. See RT at 7897.

8 In fact, Martinez himself testified about his role in imposing the “LA program” on 20th Street
 9 members:

10 By that time when I was being asked to be the leader of the gang, aside from that, I was
 11 being told that I would have to make my homies become involved in more violent acts,
 12 and, aside from that, they would have to begin to collect rent, charge taxes. Of course, I
 had always been against that. These people in El Salvador or Los Angeles, I would say
 yes to them. ...

13 RT at 6350. Mr. Martinez also denied that he ever actually did what the “Big Homies” asked him to
 14 do. *Id.* However, the credible evidence indicates Mr. Martinez did in fact help institute the “LA
 15 program” while he was leader of 20th Street.

16 Similarly, at the various 20th Street meetings, Claros-Acosta told the group to “follow the rules
 17 of L.A., and we had to get our shit together, get the gang more organized.” RT at 2838; see also
 18 Exhibit 2414 (Martinez and Claros-Acosta giving the “rules” to those present at meeting, including Mr.
 19 Flores); Exhibit 2410 (Claros-Acosta informing the group that “there’s been a disorganized mess in
 20 the, in the gang, . . . we’re trying to organize this problem again here on the streets.”); RT at 5560
 21 (Martinez testifying about Claros-Acosta criticizing members for not “taxing” enough). In fact, Mr.
 22 Flores was recorded (by Claros-Acosta) at a meeting led by Claros-Acosta and Martinez
 23 acknowledging that the rules require taking proposed new members “out to go and do a hit.” See
 24 Exhibit 2410 at 17. Claros-Acosta also informed the group that they had to do “jale” in order to “earn
 25 their letters” See RT at 7618. He also, while working for the government, tattooed various members of
 26 the 20th Street clique including Mr. Flores with MS-13 tattoos, knowing full well that by so doing he
 27 was branding these young men as gang members, binding them to the gang, and also knowing that such
 28

1 branding was permanent since tattoo removal was punishable by death (as testified to by Carlos
2 “Tweety” Garrido).

3 Mr. Flores asserts that such directives from the leaders of 20th Street, who were also informants
4 at the time they were running the gang, carried powerful persuasive force given that Mr. Flores and the
5 other members were often reminded that failure to follow the rules would be punished by death. The
6 compulsion presented by this type of inducement, in which the leader of a criminal organization orders
7 an underling to commit a crime with an implied threat, was recently recognized by the First Circuit in
8 *United States v. Luisi*, 482 F.3d 43 (1st Cir. 2007). There, the court examined an entrapment defense
9 in which a government agent asked a higher ranking mafia member to order a subordinate to engage in
10 a crime with the informant. *Id.* The First Circuit found that the informant’s use of the leader’s
11 authority could constitute improper inducement:

12 In light of our understanding of the law, we think a properly instructed jury could
13 conclude that the government was responsible for Merlino's order to Luisi. Indeed, such
14 a jury could decide that: (1) Previte specifically requested that Merlino order Luisi to
15 engage in the cocaine deal; (2) Previte's request came after earlier government efforts to
16 ensnare Luisi, without a middleman, had not been fruitful; (3) Previte, as an LCN
17 captain, understood that the order he requested from Merlino would contain an implied
18 threat of death, physical harm, or serious retribution if Luisi failed to comply . . .

19 *Id.* at 56.³ Mr. Flores asserts that the orders handed down by Martinez and Claros-Acosta when they
20 were the leaders of 20th Street carried a similar implied threat of death. In fact, there is ample evidence
21 in the record that Claros-Acosta sought to have former leader Ivan Cerna killed as punishment for
22 Cerna’s alleged failure to properly organize 20th Street.

23 Finally it must not be overlooked that Mr. Flores lived with Manuel Franco, who was in effect
24 his “brother in law” due to Franco’s relationship with Mr. Flores’ sister, for several years during the
25 charged conspiracy. Mr. Franco was several years older than Mr. Flores, mentored him in the ways of
26 the gang, encouraged him to abscond from his placements at juvenile group homes, and schooled him
27 in criminal behavior. At the same time, Mr. Franco was a paid government agent, working for the FBI,

28 ³ The Court in *Luisi* also noted that there was “ a tape recording of the conversation in which
the middleman pressured Luisi” (see *id.* at 54 n.11), just as there are multiple recordings in evidence in
this case in which Claros-Acosta and/or Mickey exhort the members of 20 Street to abide by the “L.A.
program” and do more “jale” for the gang.

1 and actively recording selected incriminating conversations with Mr. Flores, as well as other MS-13
2 members.

3 The government's role in encouraging and nurturing Mr. Flores' participation in the gang
4 simply cannot in fairness be overlooked, and it is a critically important sentencing factor in the case of
5 Mr. Flores.

6 **2. Mr. Flores' History and Personal Characteristics.**

7 Mr. Flores' personal history is accurately, but not fully, described in the PSR.

8 Jaime Martinez had a particularly negative impact on Mr. Flores' life. Mr. Flores was very
9 young when he met and fell under the influence of Mr. Martinez, an older gang member and
10 government informant. Mr. Flores met Martinez in 2002, when Flores first moved here from El
11 Salvador at 12 years old. See RT at 5520-21. Martinez testified that Flores joined 20th Street in 2003,
12 when Mr. Flores was 13. *Id.* Martinez thereafter began working for the government in the Fall of
13 2005, when Flores was 15.

14 Mario Molina testified that Mr. Flores admitted that he became involved in MS-13 in El
15 Salvador when he was a little boy of about 12 years, and that when Mr. Flores was stopped by the
16 police in San Francisco, he often admitted to joining 20th Street several years earlier. Mr. Flores made
17 these statements when he was 16 and 17 years old, so it is clear that Mr. Flores joined the gang when
18 he was a young boy. It is equally clear that Mr. Flores fell under the influence of several older gang
19 members.

20 As mentioned previously, Sabrina Manzanares, Mr. Flores' sister, had a long term relationship
21 and a child with Manuel Franco (see, e.g., RT at 10866), another older 20th Street member (he is four
22 years older than Mr. Flores). Mr. Franco played the role of an older brother in Mr. Flores' life, and
23 actively encouraged and coached his participation in the gang and his criminal behavior. Unbeknownst
24 to Mr. Flores, Mr. Franco also began working for the government as an informant in 2005, when Mr.
25 Flores was 15.

26 Federal and state courts treat juvenile offenders, even serious offenders, differently than adults
27 who commit serious crimes. Juveniles "have a 'lack of maturity and an underdeveloped sense of
28 responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures,

1 including peer pressure'; and their characters are 'not as well formed.'" *Graham v. Florida*, 130 S. Ct.
2 2011, 2026 (2010).

3 From the time when Mr. Flores joined 20th Street until his arrest, Mr. Flores' gang activities
4 were supervised and led by a succession of government informants, including one who he lived with as
5 a family member, for years. And under the supervision and influence of these informants, Mr. Flores,
6 as well as the other younger members of the gang, were directed to perform more "jale," to extort more
7 "taxes," and to become more organized and violent. The informants were thus largely responsible for
8 20th Street members committing multiple homicides in 2008, and the Court must consider this fact in
9 deciding an appropriate sentence under section 3553.

10 Mr. Flores also showed reluctance to fulfill his obligations as an 20th Street member. He
11 presented testimony establishing that in 2007, he sought to have his MS-13 tattoos removed at the
12 Second Chance counseling center in the Mission (informant Carlos Garrido testified that the gang's
13 penalty for members removing tattoos was "death."). See, e.g., RT at 13935-38. Some of these tattoos
14 were placed on Mr. Flores by Claros-Acosta, while Claros-Acosta was working as an informant. See
15 RT 7531, 7682. Evidence of writings by Mr. Flores indicating his dissatisfaction with his life while a
16 gang member were also introduced. See Exhibit 700 (Notebook taken during 8/25/08 search of Flores'
17 apartment at 80 Forest Grove, Daly City). The August 2008 recording of the meeting between Flores,
18 Claros-Acosta and others, discussed at some length above, also reveals Flores' ambivalence about what
19 he was required to do for the gang. In that recording, Flores tells Claros-Acosta and Juan Carcamo that
20 he does not want to participate in "taxing" the Nieros and that he does not think it was fair to require
21 the younger 20th Street members to participate in activities that would inevitably result in their arrests.

22 Part of the rationale in imposing lesser sentences on youthful offenders is that "[j]uveniles are
23 more capable of change than are adults" and "[f]rom a moral standpoint it would be misguided to
24 equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's
25 character deficiencies will be reformed.'" *Graham*, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at
26 570). "Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and
27 rehabilitation." *Id.* at 2032.

Mr. Flores was about 12 when he actually joined the charged conspiracy and was 19 when he was indicted and incarcerated, and his youth and potential for rehabilitation are personal characteristics the Court must consider under section 3553.

B. The Need for the Sentence Imposed to Satisfy Certain Articulated Purposes.

1. To Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense.

A term of 35 years imprisonment is comparable to sentences handed out in state and federal courts for some of the most heinous crimes of which a defendant can be convicted. See, e.g., Cal. Penal Code §§ 187, 192 (25 to life for first degree murder); 21 U.S.C. § 841(b)(1)(A) (20 to life for large-scale narcotics trafficking resulting in death); 18 U.S.C. § 2251A(a) (30 years to life for trafficking in minors for the purpose of sexual exploitation). The Eight Circuit recently noted that in 2010 the average sentence for murder convictions in that circuit between 2005 and 2010 was just under 250 months imprisonment. See *United States v. Boneshirt*, 2011 U.S. App. LEXIS 22036, *34 fn.5 (8th Cir. 2011) (Bright, J., concurring).

2. To Afford Adequate Deterrence to Criminal Conduct.

Mr. Flores submits that a term of 35 years would be more than sufficient to deter him from committing any new offenses.

3. To Protect the Public from Further Crimes of Mr. Flores.

Should the Court sentence Mr. Flores to the suggested term, Mr. Flores would be about 51 years old when he is released from prison and 56 years old when he completes his term of supervised release. Given this advanced age, there is much less chance that Mr. Flores will commit the types of crimes of which he has been convicted.

C. The Kinds of Sentences Available.

The Guidelines require a lengthy term of imprisonment, which Mr. Flores agrees is necessary under the statutes.

D. The Sentencing Range Established for the Applicable Category of Offense Committed by the Applicable Category of Defendant as Set Forth in the Guidelines.

Mr. Flores agrees that his Guidelines range, even if properly calculated, would result in a sentencing range of life imprisonment. The 35 year sentence suggested by Mr. Flores represents a one level reduction of the otherwise applicable Guidelines range, from level 43 to level 42, if Mr. Flores' Guidelines calculations do not include the above discussed grouping and leadership adjustments. At level 42, Mr. Flores' applicable range would be 360 months to life, so the suggested sentence of 420 months imprisonment would be well within that range. Cf. , 552 U.S. at 51 (review of "the substantive reasonableness of the sentence imposed" must "take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.")

E. Pertinent Policy Statements Issued by the Sentencing Commission.

The Ninth Circuit and other circuits have held that sentencing judges may rely on any . . . policy statement[s] or commentary in the guidelines that might warrant consideration in imposing sentence.' *United States v. Lawrence*, 916 F.2d 553 (9th Cir. 1990) (citing U.S.S.G. s 1B1.1); see also *United States v. Bowser*, 941 F.2d 1019, 1023 (10th Cir. 1991); *United States v. Pickney*, 938 F.2d 519, 521 (4th Cir. 1991); *United States v. Brown*, 903 F.2d 540, 545 (8th Cir. 1990).

One of the primary goals of the Sentencing Guidelines is "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." *United States v. Reyes*, 8 F.3d 1379, 1385 (9th Cir. 1993)(citing U.S.S.G. Ch. 1, Pt. A(3), intro. comment).

F. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct.

Following *Booker* and the re-establishment of the primacy of the section 3553(a) factors, the courts must now consider the need to avoid unwarranted sentencing similarities among defendants who are not similarly situated, as well as unwarranted disparities among defendants who are similarly situated. See *Gall*, 128 S. Ct. at 600 (approving of the judge's "consider[ation of] the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated") (emphasis in original).

Mr. Flores submits that several co-defendants who were more culpable than Mr. Flores will likely be sentenced to the same term of imprisonment - life - the government and U.S. probation are recommending for Mr. Flores. Moreover, other equally or more culpable defendants, including e.g., Ivan Cerna, Cesar Alvarado and Walter Chinchilla Linar, have reached plea agreements that will result in considerably less serious sentences than that proposed by the government for Mr. Flores. Mr. Cerna was clearly the leader of the 20th Street clique for years until late 2005. In the government's sentencing memo regarding Mr. Cerna it asserted that the 20th Street clique *became more bloodthirsty beginning in 2004 and 2005*, when MS-13 gang members from Los Angeles and elsewhere settled into the Bay Area and sought to mold the 20th Street clique in their own image.” Docket #3840 at p.3 (emphasis added). Mr. Cerna was sentenced to 17 ½ years in this case. Cesar Alvarado and Walter Chinchilla Linar were both personally involved in the murder of Ivan Miranda, as well as being charged with the racketeering conspiracies that Mr. Flores has been convicted of. They were each sentenced to 20 years in prison. Considerations of possible sentencing disparity therefore militate in favor of sentencing Mr. Flores to a term of years below the life terms the Court may give other defendants who personally committed homicides, and proportional with the sentences agreed to by the government for similarly situated co-defendants in this case who were permitted to plead guilty for considerably shorter sentences.

Here, a life term for Mr. Flores would result in exactly the situation described in *Gall*. Mr. Flores, who did not commit or order any of the charged homicides, though he was convicted of participating in racketeering conspiracies knowing that such homicides would occur, would receive the same sentence as the defendants who did commit murders.

CONCLUSION

For the foregoing reasons Mr. Flores, through counsel, respectfully suggests that a sentence of 35 years imprisonment is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing.

Dated: November 23, 2011.

Respectfully Submitted,

/s/ Mark Rosenbush

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